No. 87-1350

In the Supreme Court of the United States

OCTOBER TERM, 1988

O.N.E. SHIPPING, LTD., PETITIONER

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the act-of-state doctrine was properly invoked to dismiss a private antitrust case in which the alleged conspiracy depended for its success on the existence of foreign legislation, but the court below failed to identify any respect in which the plaintiff's claim necessarily constituted a challenge to the validity of any act of a foreign government.

2. Whether there is an exception to the act-of-state doctrine for the acts of a commercial enterprise that is the agency or instrumentality of a foreign government.

3. Whether the foreign sovereign compulsion doctrine provides any basis for the dismissal of the complaint.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner O.N.E. Shipping, Ltd., a Bermudan corporation with offices in the United States, transports liquid bulk cargo (LBC) [1] by ship between the United States and ports in Central and South America. The three respondents are also foreign shipping companies with offices in the United States. Flota Mercante Gran-

[1] Liquid bulk cargo includes various liquid chemicals, fats, and oils. These cargoes are usually transported in international commerce in specially equipped "parcel" tankers, designed to carry diverse liquid products with minimal risk of contamination of one by another. Ocean shipping is the primary means of transporting LBC between the United States and Colombia.

colombiana, S.A. (Flota), is a Colombian corporation substantially owned by the National Federation of Coffee Growers of Colombia in its capacity as administrator of the National Coffee Fund. Andino Chemical Shipping, Inc. (Andino), is a Panamanian corporation wholly owned by Holland Chemical International. Maritima Transligra, S.A. (Transligra), is an Ecuadoran corporation owned in part by Flota and Andino. Pet. App. A4, A26-A27.

Certain Colombian government decrees issued in 1969 as part of a program to develop and promote a national-flag merchant marine, known as the Reservation Laws, favor Colombian-flag vessels in the import and export trade. As subsequently modified, those decrees reserve 50% of Colombian general import and export cargo to Colombian-flag vessels or "associated" vessels (vessels of foreign-flag carriers that have entered into pooling and other agreements with a Colombian carrier). Pet. App. A27. The Reservation Laws initially did not affect LBC exports from the United States to Colombia, because no Colombian-flag carriers served the trade.[2] Flota, although a Colombian-flag carrier, had no suitable tankers. The trade was handled by various carriers, including petitioner and Andino.

The Reservation Laws first affected the U.S.-Colombian LBC trade in 1973, when, petitioner alleges, Andino induced Flota to petition the Colombian government for exclusive Colombian carrier rights in the LBC trade, to be served through space-chartering arrangements on Andino's vessels (O.N.E. C.A. Br. 11). Flota and Andino did enter into chartering agreements, and the Colombian Director General of Maritime and Port Matters approved application of the Reservation Laws to LBC carried between the United States and Colombian ports on Andino's

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[2] According to the court of appeals (Pet. App. A4, A5), U.S.-flag vessels are not subject to the Reservation Laws' restrictions. However, no U.S.-flag carriers served the trade either.

non-Colombian-flag vessels under those agreements.[3] In 1976, Flota entered into similar agreements with Transligra and accordingly modified its agreements with Andino (Pet. App. A4-A5). Following those agreements, Flota—acting through its non-Colombian associates—captured up to 89% of the business of carrying LBC into Colombia (*id.* at A5).[4] Petitioner no longer shared any portion of the trade.

In 1977, respondents sought Federal Maritime Commission (FMC) approval of the 1976 agreements, pursuant to Section 15 of the Shipping Act of 1916, 46 U.S.C. (& Supp. III) 814. FMC approval would have provided an exemption from the U.S. antitrust laws. The FMC in 1984 found that the agreements were anticompetitive, artificially increased transportation rates, and were detrimental to United States commerce (Pet. App. A5-A6, A28). It therefore disapproved the agreements and ordered respondents to cease and desist implementing them.

2. Shortly after the FMC decision, petitioner brought an action against respondents in the United States District Court for the Southern District of New York, alleging violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. Petitioner charged respondents with unlawful concerted refusal to deal, conspiracy to exclude competitors, unlawful exclusive dealing, conspiracy to fix

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[3] The functions and powers of the Director General of Maritime and Port Matters include "[a]pprov[ing] or disapprov[ing] freight agreements executed by the Colombian ship owners and transportation associations and agreements, based on equality or reciprocity of treatment for Colombian ship owners and directed at the economic and operative streamlining of their traffic," and "[r]eceiv[ing] and handl[ing] applications submitted by Colombian ship owners for the application of the provisions of the laws concerning cargo reserves" (Decree 2349, art. 3, ¶¶ 13, 19, in translation).

[4] Flota's market share was well above the 50% Colombian cargo reservation. The district court explained that economies of scale lead to consolidation rather than division of the small shipments characteristic of the trade (Pet. App. A28).

prices, conspiracy to divide markets and allocate customers, and attempt and conspiracy to monopolize.[5]

The district court dismissed the action, holding that it had "no jurisdiction * * * because of principles of [international] comity" (Pet. App. A29).[6] The court viewed the analysis of international comity as a matter of "balancing of the interests of the United States in asserting jurisdiction against the international implications arising from such assertion" (*ibid.*), under the principles set forth in *Timberlane Lumber Co.* v. *Bank of America N.T. & S.A.*, 549 F.2d 597 (9th Cir. 1976), and *Mannington Mills, Inc.* v. *Congoleum Corp.*, 595 F.2d 1287 (3d Cir. 1979).

The court noted petitioner's claims of substantial effects on the United States and of an absence of conflict between U.S. and Colombian law, as well as the FMC's finding of anticompetitive effects. But it stated that it "f[ound] * * * that Colombian interests outweigh what-

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[5] Those allegations were not fully specified in petitioner's complaint but instead were elaborated in subsequent pleadings. Petitioner alleged that Flota's intent to monopolize was shown by its opposition to implementation of an agreement between petitioner and a U.S.-flag carrier, Lykes Bros. Steamship Co., that would have permitted petitioner to carry LBC as an associated carrier of Lykes. The Lykes agreement was never implemented. See Pet. App. A27.

[6] The district court briefly addressed, without deciding, whether subject-matter jurisdiction was lacking under the Foreign Trade Antitrust Improvements Act of 1982 (FTAI Act), 15 U.S.C. 6a (Title IV of the Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1246 (the ETC Act)), which limits antitrust jurisdiction over foreign commerce to conduct with a direct, substantial, and reasonably foreseeable effect on certain aspects of that commerce. The court noted, "after a cursory review of the matter, the ETC Act would not appear to provide a basis for refusing to exercise jurisdiction over this action" (Pet. App. A33 n.2). The court did not address whether the complaint stated a cause of action or whether the case was time-barred (*id.* at A32).

ever antitrust enforcement interests the United States may have in the case as a matter of law" (Pet. App. A31). The court found that the purpose of the Reservation Laws was to promote economic development. The court also noted the role of certain Colombian government agencies in regulating shipping and cited Flota's links to the Federation. The court then concluded that "[e]nforcement of this antitrust action would appear to adversely impact the Colombian Government's program to develop its coffee growing regions." *Ibid.*

The court further concluded that assertion of jurisdiction and the granting of relief might have adverse effects on foreign relations because of the Colombian government's "significant ownership interest in Flota and based on Colombia's interest in implementing its Reservation Law" (Pet. App. A31).[7] It stated (*id.* at A31-A32):

> Were this court to grant relief, Colombian authorities would be encouraged to disrespect analagous [*sic*] trade promotion laws of the United States. Enforcement of our antitrust laws to protect the interests of a foreign corporation as in this instance might also result in direct conflict with our foreign policy. If the relief sought were granted, Colombian shippers would be deterred from achieving the advantage in the trade which the Reservation Law seeks to promote and there would be no direct benefit to this country.

3. Petitioner appealed, arguing principally that the district court's proper role at this stage of the case was only to determine whether the allegations of the complaint showed a direct, substantial, and reasonably foreseeable anticompetitive effect on U.S. commerce (C.A. Br. 20-29) and that it was improper for the district court, in the name of "comity," to balance U.S. and foreign interests

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[7] The district court had not sought the views of the Executive Branch concerning any possible effect of this lawsuit on foreign relations, nor did the court of appeals subsequently seek the views of the United States.

in order to decide whether to entertain the lawsuit (*id.* at 30-42). In making that argument, petitioner appeared to assert that a U.S. antitrust court could and should explicitly condemn the Colombian government's cargo reservation laws and its implementation of them (*id.* at 29).[8] Petitioner also asserted briefly that, even under a balancing approach, it was improper for the district court to dismiss the lawsuit (*id.* at 42-44).

Respondents advanced numerous arguments in support of the district court's judgment. Among other things, respondents argued that, "[a]lthough [the district court] did not expressly characterize * * * [its] analysis as an act-of-state inquiry, the act-of-state implications of an assertion of U.S. jursidiction are an essential feature of the comity balancing test" (Flota C.A. Br. 30) and that "[t]he Second Circuit's decision in *Hunt* v. *Mobil Oil*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977), fully supports, under the act-of-state rubric, [the dis-

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[8] Specifically, petitioner's brief argued (C.A. Br. 29):

> The exclusion of non-national-flag/non-associate carriers [by the Reservation Laws], and severe restrictions imposed on such lines[,] has [*sic*] to date has [*sic*] and will continue to foreclose commercially-determined shipper-carrier relationships, and has replaced those relationships with Colombian Government-dictated relationships. * * * Colombian law, as promulgated, and as manipulated by Flota, has eliminated services which U.S. shippers have found desirable * * * and which third-flag carriers such as [petitioner] have previously offered.
>
> U.S. shipping and antitrust policy are integral parts of U.S. trade policy and must not be dictated by trading partners, by means of cargo reservation laws. Where the interests of U.S. exporters and ocean carriers * * * and overall U.S. commerce are at stake, and where a foreign government seeks to enforce a concept which runs counter to the U.S. principle of non-protectionist, free and fair access to trades, and actions are taken in furtherance of the concept, which limit the availability of shipping services and inhibit the flow of commerce, the anticompetitive effect on United States' [*sic*] commerce and the necessity of taking jurisdictionis [*sic*] beyond cavil.

trict court's] dismissal of [petitioner's] antitrust suit" (Flota C.A. Br. 32). Respondents contended that petitioner's "antitrust suit is squarely premised on the claim that it was harmed by appellees' manipulation of, or complicity with, the Colombian government" and therefore should be dismissed under the act-of-state doctrine (*id.* at 34).

Petitioner's principal reply to respondents' act-of-state argument was an assertion that it was not properly before the court of appeals (C.A. Reply Br. 15-16). Petitioner added that "the act of state defense would not be available if [petitioner] demonstrates, as alleged, that [respondents'] manipulation of the Colombian cargo reservation laws was part of a broader restraint of trade and monopolistic scheme" (*id.* at 16).

4. A divided court of appeals affirmed, but without either adopting or rejecting the district court's reasoning. The court briefly summarized the district court's comity balancing analysis (Pet. App. A6-A7), but it did not in terms rest its affirmance on principles of comity. Instead, it stated that judicial inquiry into "the acts and conduct of the officials of the foreign state, its affairs and its policies and the underlying reasons and motivations for the actions of a foreign government" is "foreclosed under the act of state doctrine" (*id.* at A8). Because, in the court's view, petitioner's claims were "premised on contentions that it was harmed by acts and motivations of a foreign sovereign" (*id.* at A10) and because the "causal chain between [respondents'] alleged conduct and [petitioner's] injury cannot be determined without an inquiry into the motives of the foreign government" (*ibid.*), dismissal was appropriate.

Although Flota had not contended that it was an instrumentality of a foreign sovereign and the district court had concluded only that Flota "[a]pparently" had that status (Pet. App. A26), the court of appeals observed in passing that Flota was " 'an agency or instrumentality' of the Colombian Government within the

meaning of the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. Section 1603(b)" (Pet. App. A4 (footnote omitted)).[9] The holding of the court of appeals was apparently not based on that observation, however. The court did not inquire whether Flota is immune from the jurisdiction of United States courts (see 28 U.S.C. 1604), or whether an exception to sovereign immunity applies (see 28 U.S.C. 1605). Nor did it consider whether Flota had been invested with sovereign authority (see *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 691-693 (1976) (opinion of the Court)), or whether there is an applicable "commercial exception" to the act-of-state doctrine (see *id.* at 695-706 (opinion of White, J.)).

In addition, although the district court had not found, nor had respondents contended, that any of respondents' alleged conduct had been compelled by any government, the court of appeals also observed in passing that "where as here the conduct of the [respondents] has been compelled by the foreign government they are entitled to assert the defense of foreign government compulsion" (Pet. App. A10). The court of appeals did not specify, however, the conduct it considered to have been compelled or its relation to petitioner's claim. Finally, the court noted that petitioner had available, and had invoked, an alternative remedy for its "dissatisfaction with Colombia's cargo reservation laws" (Pet. App. A11)—a separate proceeding before the FMC.[10]

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[9] Indeed, Flota's own court of appeals brief (at 35) characterized Flota as a "private corporation" the majority of whose stock is held by the Federation in a "quasi-public capacity."

[10] The court referred (Pet. App. A11, A12 n.6) to a petition filed in 1986 before the FMC under Section 19(1)(b) of the Merchant Marine Act of 1920, 46 U.S.C. (& Supp. III) 876(1)(b). Under that provision, the FMC is empowered to adopt regulations to meet unfavorable conditions in shipping attributable to foreign laws or to the competitive methods or practices of owners or operators of foreign vessels. Although the petition did not result

Judge Cardamone dissented. He explained that he understood the majority to have affirmed the dismissal on comity grounds, "relying on well-settled act of state doctrine principles" (Pet. App. A14). In his view, however, neither comity principles nor the FTAI Act justified that result (*ibid.*). Judge Cardamone concluded that both the language and the legislative history of the FTAI Act make it "obvious that Congress did not aim to deprive federal courts of jurisdiction over suits like the instant one" (*id.* at A17). And, Judge Cardamone believed, Colombia's interest in its Reservation Laws—in his view the primary factor on which the majority had relied in its comity analysis—was "insufficient to preclude jurisdiction" under two cases in which this Court had "addressed the effect of United States antitrust laws on anticompetitive conduct allegedly aided by foreign protectionist legislation" (*id.* at A20, citing *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962)).

DISCUSSION

The decision of the court of appeals manifests some confusion about the scope of the act-of-state doctrine. Nevertheless, because it is not clear to what extent the decision below ultimately rests on the act-of-state doctrine or to what extent that doctrine is implicated by the record or the filings by petitioner in this case, we are not persuaded that this case presents an appropriate occasion for the Court to grant review.[11]

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in formal action by the FMC, petitioner states (Pet. 10-11 n.16) that it led to changes in Colombia's treatment of the reserved cargo. We understand that petitioner now is among the carriers entitled to compete for the cargo reserved to Colombian and affiliated carriers under the Reservation Laws.

[11] In addition to its first three questions, which address generally the propriety of dismissing on act-of-state grounds, petitioner raises two additional questions that, in our view, need not

1. This Court's classic statement of the act-of-state doctrine appears in *Underhill* v. *Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

More recently, this Court has explained that the act-of-state doctrine "precludes the courts of this country from inquiring into the validity of the public acts [of] a recognized foreign sovereign power committed within its own territory." *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 401 (1964); see also *Alfred Dunhill of London, Inc.* v. *Republic of Cuba*, 425 U.S. 682, 697 (1976) (opinion of White, J.).

To consider the possible application of the act-of-state doctrine to this case, one must first understand what actions petitioners allege are violations of the antitrust laws. Unfortunately, petitioner's complaint, its briefs, and its petition for a writ of certiorari are less than crystal clear in that regard. The court of appeals viewed

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be reached. Although the court of appeals asserted that respondents' conduct had been "compelled by the foreign government" (Pet. App. A10), the record is devoid of any evidence suggesting foreign sovereign compulsion. Respondents have not raised a foreign sovereign compulsion defense, and the court of appeals did not clearly rest its decision on that factor. Similarly, although the court of appeals characterized respondent Flota as an "agency or instrumentality" of the Colombian government (*id.* at A4), we do not understand the court of appeals to have based its holding on the belief that the acts of Flota should be deemed acts of the foreign sovereign. Accordingly, there is no occasion to determine here whether there is an exception to the act-of-state doctrine, or to foreign sovereign immunity, for commercial enterprises.

this case, at least in part, as a "direct challenge to Colombia's cargo reservation laws" (Pet. App. A6), and petitioner has made statements that tend to support that view (see note 8, *supra*). Insofar as petitioner did contend that such a challenge could be heard by a U.S. antitrust court, the court of appeals properly rejected that contention on act-of-state grounds. But petitioner's lawsuit appears also to challenge actions of respondents that at best were encouraged and approved by the Colombian government [12] and at worst were undertaken without any government involvement at all.[13] We take no position on whether petitioner's allegations state a claim under the antitrust laws, but we do believe that the court of appeals erred to the extent its decision is understood as dismissing those claims in their entirety under the act-of-state doctrine.

Petitioner alleges as antitrust violations some conduct that, if it is illegal under the U.S. antitrust laws, is illegal for reasons that do not call into question the validity of the Reservation Laws or any other public act of a foreign sovereign. Colombia's Reservation Laws in themselves worked no exclusion of petitioner from the LBC trade; petitioner alleges that it was excluded by respondents' conduct. The court of appeals itself noted petitioner's contention that respondents manipulated the Reservation Laws to create a monopoly (Pet. App. A9-A10).

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[12] The formation of any Flota-Andino agreement, for example, was not an act of the Colombian government itself or an act compelled by the Colombian government, although at least one such agreement certainly was approved by the Colombian government and may have been encouraged by the Colombian government.

[13] For example, petitioner alleges that Flota put pressure on Lykes Steamship Company to refuse to carry out an agreement with petitioner that would have entitled petitioner to be treated as an associated carrier allowed to compete for the reserved 50% under the Reservation Laws. None of the filings that we have reviewed gives reason to believe that the Colombian government had anything to do with that alleged action.

It thus appears that the conduct challenged here in fact may not be Colombia's promulgation and implementation of the Reservation Laws, but rather an alleged unlawful private agreement among respondents that excluded petitioner from the Colombian LBC trade.

On that view, Colombia's Reservation Laws are simply part of the context within which the challenged conduct allegedly occurred (see, *e.g.*, *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States* v. *Sisal Sales Corp.*, 274 U.S. 268 (1927)). And to hold respondents, as private parties, liable on that theory, a court need not question the validity of those laws or any other Colombian sovereign act or even inquire into the motivations or circumstances that may have caused the Colombian government to act as it did; a court need only hold that U.S. antitrust law forbids conduct that the law of another nation may permit. There is nothing particularly unusual about the proposition that a company engaged in a business affecting two jurisdictions must comply with the law of both, and one could readily concede that respondents have complied with valid Colombian laws yet determine that they have not complied with equally valid U.S. laws. A foreign nation's law can be perfectly valid in every sense of the word and yet provide no defense to a claim that a corporate defendant, which took action in compliance with that law but not mandated by that law, breached U.S. laws with which it also had a duty to comply. Accordingly, because petitioner appears to rely in part on claims of this sort, we see no justification at this stage for dismissal of this suit in its entirety under the act-of-state doctrine.

2. One step in the reasoning of the court of appeals was a statement that an "inquiry into the motives of the foreign government" would be required if the case were to proceed (Pet. App. A10). It is not clear why that is so. Neither the court of appeals nor the parties identified either the actors or the actions with respect to which motivation must be determined, or explained why such a

determination was necessary. At bottom, petitioner's theory is that respondents entered into certain anticompetitive agreements and then sought, and received, approval of the agreements from the Colombian government.[14] Although approval of the agreements may be a necessary link in the causal chain between respondents' private conduct and certain of the injuries petitioner alleged, it is undisputed that Colombia would have had no occasion to approve the challenged agreements if respondents had not entered into them. It is not clear that it makes any difference to petitioner's claims what led the Colombian government to enact the Reservation Laws or to approve respondents' agreements; all that matters to the causal chain is that Colombia did approve respondents' agreements. Nor is it clear, even as a matter of Colombian law, that the mere approval of the agreements had the effect of compelling (rather than merely authorizing) any private conduct by respondents or of insulating that conduct from all legal challenge.

If it were true that resolution of petitioner's claims on the merits would require inquiry into the motives of the Colombian government or persons occupying official positions in that government, then a court of appeals decision addressing the application of the act-of-state doctrine in that setting might warrant a grant of certiorari. The courts of appeals have taken different approaches to this issue.[15] In a case in which the plaintiff was harmed di-

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[14] Petitioner may also have alleged that respondents instigated certain other actions by officials of the Colombian government.

[15] The court below relied on its prior opinion in *Hunt* v. *Mobil Oil Corp.*, 550 F.2d 68, cert. denied, 434 U.S. 984 (1977), but *Hunt* was predicated on the court's view that the circumstances of that case were such that an inquiry into motivation necessarily implicated validity. In *Hunt*, an independent oil producer alleged that the concerted activity of other oil producers prevented the plaintiff from reaching certain agreements with the government of Libya, with the result that the Libyan government terminated

rectly by a foreign government's grant of an oil concession to a competing applicant and the private defendant was alleged to have influenced that government action by means of illegal payments to foreign government officials, the Ninth Circuit has suggested that the act-of-state doctrine is applicable when an inquiry into foreign governmental motivation would be required. *Clayco Petroleum Corp* v. *Occidental Petroleum Corp.*, 712 F.2d 404 (1983), cert. denied, 464 U.S. 1040 (1984). In somewhat different circumstances, the Fifth Circuit has held that an inquiry into a foreign government's motivation should not necessarily be treated in the same manner as an inquiry into the validity of its acts for purposes of the act-of-state doctrine, reasoning that "[p]recluding all inquiry into the motivation behind or circumstances surrounding the sovereign act would uselessly thwart legitimate American goals where adjudication would result in no embarrassment to executive department action." *Indus-*

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the plaintiff's right to produce and export crude oil and nationalized its assets. The district court reasoned that the damage complained of resulted directly not from the acts of the defendants, but rather from those of the Libyan government, and that the plaintiff would have to prove that Libya would not have so acted but for defendants' alleged conspiracy. It therefore dismissed on act-of-state grounds. A divided panel of the Second Circuit affirmed, reasoning, on the facts before it, that the necessary inquiry into the motivation of Libyan action "inevitably involves its validity" (550 F.2d at 77), because the validity under international law of measures taken against the rights and property of foreign nationals depends on the reasons for those measures (*ibid.*). Thus, if this were a case in which the success of the plaintiff's antitrust claims depended on the motivation or causes underlying the actions of the Colombian government, but in a manner that did not undermine the validity of those actions, *Hunt* would not control. As we have observed, however, we do not see petitioner's allegations as calling the motivation of the Colombian government into question any more than they call into question the validity of that government's actions. Moreover, here, unlike in *Hunt*, the alleged injury did not result directly from the action of the foreign government itself.

trial Inv. Dev. Corp. v. *Mitsui & Co.*, 594 F.2d 48, 55 (1979), cert. denied, 445 U.S. 903 (1980); see *Clayco*, 712 F.2d at 407 (distinguishing *Mitsui* as a case involving a challenge to private conduct undertaken against the background of foreign law).

Most recently, the Third Circuit in *Environmental Tectonics* v. *W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (1988), petition for cert. pending, No. 87-2066, aligned itself with the Fifth Circuit, reversing the dismissal of a complaint in a case where the district court had concluded that the act-of-state doctrine precluded judicial inquiry into the motivation of a foreign sovereign act—in that case, as in *Clayco*, based on a claim that the responsible officials of the foreign government acted as they did because they accepted bribes.[16] The Third Circuit explained that the act-of-state doctrine applies to inquiries into "the validity of a foreign state's governmental acts in regard to matters within that country's borders" (*id.* at 1057-1058), specifically criticized what it regarded as the Ninth Circuit's "expansive application of the act of state doctrine" (*id.* at 1060) in *Clayco*, and quoted with approval a letter sent by the Legal Adviser, United States Department of State, to the district court in *Environmental Tectonics*, stating that the act-of-state doctrine "'only precludes judicial questioning of the *validity* or *legality* of foreign government actions.'" (*id.* at 1061 (emphasis in original)). Because the Third Circuit believed that adjudicating the claims before the court in that case "would have required at most an inquiry only into the motivations behind, rather than the legality of,

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[16] The Third Circuit did not hold that courts may always inquire into the motivations of foreign governments, indicating that judicial abstention may be appropriate when "a defendant come[s] forward with proof that adjudication of a plaintiff's claim poses a demonstrable, not a speculative, threat to the conduct of foreign relations by the political branches of the United States government" (847 F.2d at 1061).

the foreign government's acts" (*id.* at 1062), it held that the act-of-state doctrine did not require dismissal.[17]

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[17] The diversity of views among the circuits may result from the uncertain status of the early exposition of the act-of-state doctrine in *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347 (1909), as it relates to anticompetitive schemes that depend, at least in part, on procurement of a foreign sovereign act. See *Hunt*, 550 F.2d at 73-75 (discussing *American Banana*); *Clayco*, 712 F.2d at 407 (citing *American Banana*). In *American Banana*, the Court upheld dismissal of an antitrust complaint that alleged that the defendant had caused the government of Costa Rica to seize the plaintiff's property for the purpose of eliminating it as a competitor. The Court held that the antitrust laws do not reach conduct occurring outside the United States (213 U.S. at 357), a holding that has been rejected by subsequent decisions of this Court. *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. at 704. The Court further supported its decision by reliance on act-of-state principles (213 U.S. at 358):

> [I]t is a contradiction in terms to say that within its jurisdiction it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper. It does not, and foreign courts cannot, admit that the influences were improper or the results bad. It makes the persuasion lawful by its own act.

If this language were given an expansive reading, it would insulate from judicial scrutiny anticompetitive schemes in which the procurement of a foreign sovereign act played a part, even though the case may be resolved under the antitrust laws without questioning the sovereign act under international law or otherwise and the foreign sovereign act itself was not even the immediate cause of the injury (as in *American Banana*). That reading of *American Banana*, however, would be inconsistent with this Court's subsequent decisions in *United States* v. *Sisal Sales Corp.*, *supra* (upholding complaint alleging that defendants had conspired in the United States to monopolize and restrain trade by, among other things, securing favorable legislation in Mexico), and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, *supra* (upholding antitrust complaint alleging that private defendants had conspired in the United States to establish an exclusionary customer allocation program for sales of vanadium in Canada that had been instituted and controlled by an agency of the Canadian government). This Court has not, however, qualified this aspect of the

The United States expressed the view in response to the Court's invitations in *Hunt* and *Mitsui* that the act-of-state doctrine was not applicable in those cases simply because the suits may have involved inquiry into the motives of a foreign government, but the Court did not grant review. See Brief for the United States as Amicus Curiae, *Mitsui & Co.* v. *Industrial Inv. Dev. Corp.*, 445 U.S. 903 (1980) (denying certiorari) (No. 79-552); Brief for the United States as Amicus Curiae, *Hunt* v. *Mobil Oil Corp.*, 434 U.S. 984 (1977) (denying certiorari) (No. 76-1403).[18] In the present case, it appears that nothing ultimately turns on the motivation of a foreign

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holding of *American Banana* on the facts there presented, and it was cited in *Sabbatino*, 376 U.S. at 416, as a case "directly or peripherally" involving the act-of-state doctrine.

[18] The position that the United States took in this Court in *Hunt* and *Mitsui*, and that the Legal Adviser took in the district court in *Environmental Tectonics*, was that the act-of-state doctrine is an improper basis for dismissal in "motivation" cases, not that such cases invariably should proceed to adjudication on the merits. Putting the act-of-state doctrine aside, the political question doctrine might justify judicial abstention in cases that could cause intense embarrassment to a foreign state or improperly inject the courts into the formation or execution of the Nation's foreign policy. See *Baker* v. *Carr*, 369 U.S. 186, 211-213, 217 (1962); *Goldwater* v. *Carter*, 444 U.S. 996, 1003-1004 (1979) (Rehnquist, J., concurring in the judgment); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 547-553 (S.D.N.Y. 1984). Adjudication of a complaint implicating to some extent the conduct of a foreign government may also raise substantial problems of proof. But the possibility of such problems is not a sufficient reason to prevent the plaintiff from attempting to present competent evidence. As this Court noted in *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 697, 700-701 (1962), the jury may be permitted to draw appropriate inferences concerning causation from circumstantial evidence. Wide-ranging discovery against foreign officials may also have implications for foreign relations. This possibility, however, may simply call for appropriate judicial sensitivity in limiting discovery requests rather than for dismissal. See *Environmental Tectonics*, 847 F.2d at 1062 n.11.

sovereign act, and thus—although the court of appeals addressed the issue—it is unlikely that this Court would have occasion to do so if certiorari were granted. Accordingly, although the conflict among the circuits on the issue appears to persist, this case is not an appropriate vehicle for its resolution.

3. Given that motivation and validity of foreign actions do not appear to be truly implicated by the decision below, we see no issue in this case that calls for resolution by this Court. To be sure, there are in our view errors in the decision below, but those errors consist largely of case-specific misunderstandings of the degree to which petitioner's claims depend on foreign governmental, rather than private, action. *E.g.*, Pet. App. A10 ("O.N.E.'s allegations make clear that its antitrust suit is premised on contentions that it was harmed by acts and motivations of a foreign sovereign which the district court would be called on to examine and pass judgment on."); *id.* at A11 ("O.N.E.'s 'antitrust' claims reflect dissatisfaction with Columbia's cargo reservation laws, not with appellees' space chartering agreements.").[19] No important and unsettled issue of law would be resolved if this Court were merely to grant certiorari, construe petitioner's allegations differently, and remand on that basis. Nor, given its purported limitation to cases in which the plaintiff's challenge calls on the court to pass judgment on a foreign sovereign act, is it likely that the decision below will lead other courts to apply the act-of-state doctrine in situations in which the complaint can be adjudicated without questioning the validity of foreign governmental action.

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[19] The court of appeals was not without basis for believing that petitioner was expressing dissatisfaction with Colombia's cargo reservation laws and was improperly seeking to air that dissatisfaction by means of an antitrust suit under U.S. law (see note 8, *supra*). The Court erred, however, in suggesting that petitioner's lawsuit was not also a challenge to respondents' space-chartering agreements.

Moreover, there is some doubt whether the court of appeals decided the case under the act-of-state doctrine at all. The district court dismissed on grounds of international comity, without reference to the act-of-state doctrine, and the court of appeals affirmed without disavowing the district court's reasoning. The dissenting judge plainly understood the majority to have based its decision on principles of international comity, construed in light of act-of-state principles (Pet. App. A14, A18-A24), and respondents apparently share that understanding (Br. in Opp. 2). Although we do not endorse the district court's comity analysis, it is not inconceivable that the limited effects of respondents' actions within the United States and other factors would combine to justify dismissal based on a lack of jurisdiction. There has, however, been little development in the record of the facts that would support or undermine such a dismissal. As is the case with the act-of-state issues, "[r]esolution here of" such issues "can await a day when the issue is posed less abstractly." *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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